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IN THE SUPREME COURT OF THE UNITED STATES

IN THE MATTER OF THE ESTATE OF PAUL K. COUSINO, DECEASED

Macomb County Probate #86-96297-SE

Michigan Court of Appeals #174253 & 184104

Michigan Supreme Court #109145 & 109146

United States Supreme Court

#_____

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE

STATE OF MICHIGAN

Submitted by:
PAUL W. COUSINO
in propria persona
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17 pp

QUESTION PRESENTED FOR REVIEW

CAN AN ATTORNEY BE COMPENSATED BY A FUND FOR HAVING PREVENTED AN INDIGENT BENEFICIARY OF THAT FUND FROM EXERCISING HIS RIGHT TO APPEAL A DECISION REFUSING TO MARSHALL ALL OF THE ASSETS OF THAT FUND?

Court below: yes.

Petitioner: no.

Respondent: yes.

Implicit in that question is the question of whether or not such a prevention violates the United States Constitution? Also implicit is the question of whether or not someone can be rewarded for preventing the exercise of a constitutional right?

LIST OF ALL PARTIES INVOLVED IN THE APPEAL

JOHN B. KIEFER

PAUL W. COUSINO

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CITATIONS OF OPINIONS ENTERED BELOW

No reported decision.On March 23, 1994, Probate Judge Nowicki ordered payment of fees to Kiefer on his first annual account. (Appendix page, 2) On March 1, 1995, the same judge granted fees to Kiefer on his second annual account. (Appendix page, 2) In both cases, it is uncontroverted that the fees included in both accounts were primarily for proceeding on appeal of the estate to defend his position as personal representative and temporary personal representative. On January 24, 1997, the Michigan Court of Appeals affirmed those orders "to the extent

authorizing reimbursement from the estate for attorney fees and costs expended by the personal representative in defending his appointment on appeal. Attorney fees incurred by an executor to defend against a petition for his removal are properly chargeable against the estate where no wrongdoing is proved. In re Hammond Estate, 215 Mich App 379 (1996)." (Appendix page, 2-3)

It is of interest here to note that the matter before the Court was not "removal" of the fiduciary; but, rather, his appointment when he refused to obey an earlier order of the Michigan Court of Appeals to proceed to recover converted assets of the estate. It is also of interest that Kiefer prevented a hearing in the Court of Appeals on the question of his wrongdoing, by preventing then-indigent access to the Courts.

The undersigned, at that time a food stamp recipient, was not shown to fail to be indigent. The courts of Michigan universally determined, when the question of indigence was before them, that the undersigned was indigent at that time. However, Kiefer claimed that in this case an indigent appeal should not be permitted. The Michigan Court of Appeals, determined NOT against indigence, but the Michigan Court of Appeals, without further comment, determined that an indigent could not proceed with that appeal; although in other cases, at the same time, an indigent appeal was permitted to the undersigned.

The undersigned, then, on that earlier appeal was unable to show wrongdoing on the part of Kiefer because Kiefer was able to prevent an indigent appeal and the undersigned had no money at that time to pay an appeal entry fee.

On April 9, 1997, rehearing was denied by the Court of Appeals, without further comment, in the within case, of the January 24, 1997 decision quoted above.(APP, page 3)

On December 30, 1997, the application for leave to appeal to the Michigan Supreme Court was denied.(APP, pg4)

These decisions and other relevant decisions are present in the separate appendix.

STATEMENT OF BASIS FOR JURISDICTION

The Michigan Supreme Court refused to hear the case on December 30, 1997. Pursuant to 28 USC 1257(a),

this petition is filed within 90 days of that decision.

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Constitution, Fourteenth Amendment, section 1: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. NO STATE SHALL MAKE OR ENFORCE ANY LAW WHICH SHALL ABRIDGE THE PRIVILEGES OR IMMUNITIES OF CITIZENS OF THE UNITED STATES; NOR SHALL ANY STATE DEPRIVE ANY PERSON OF LIFE, LIBERTY, OR PROPERTY, WITHOUT DUE PROCESS OF LAW; NOR DENY TO ANY PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAWS." (emphasis added)

28 USC 1257(a): "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, OR WHERE ANY title, right, PRIVILEGE, or immunity IS SPECIALLY SET UP OR CLAIMED UNDER THE CONSTITUTION or the treaties or statutes, or any commission held or authority exercised under, the United States." (emphasis added)

CONCISE STATEMENT OF THE CASE

The first time that this probate case came to this Court was your docket #92-5797. The appendix, page 6, of that petition has a Michigan Court of Appeals decision which stated that (Roman Numeral III): "Contestant also raises a claim that the probate court erred in declining jurisdiction over nonprobate assets allegedly converted from the estate by Rekucki. We find no error. A claim of wrongful conversion must be brought by the personal representative of the estate. MCL 700.171; MSA 27.5171. A PERSONAL REPRESENTATIVE'S ROLE IN BRINGING AN ACTION FOR CONVERSION EXEMPLIFIES THE NEED IN THIS CASE FOR A DISINTERESTED PERSONAL REPRESENTATIVE." (emphasis added) The order is also enclosed in the appendix of this present application, pg.4-8.

Primarily, that petition dealt with the source of funds to pay attorney fees involved in a will contest lost by Loralee Rekucki and won by the undersigned. This Court denied certiorari on November 2, 1992. Also at issue in that case was the inflammatory way in which the political activities of the undersigned (a Court Reformer for the past 28 years in Michigan, and a part of the non-violent portion of the Court Reform Movement) were used by opposing counsel to unjustly influence the Michigan Court of Appeals, so that the fact that attorney fees were not handled properly under Michigan law was, in part, tolerated by the Michigan Court of Appeals.

The second time that this probate case came before this Court was your docket #92-6751. Prior to that appeal, a discovery was made of corruption on the part of the Probate Judge, James F. Nowicki, and that corruption was brought to the attention of the Michigan Court of Appeals. Again, the handling of attorney's fees was at issue. The Court of Appeals, angry that someone who was not even an attorney would present evidence of corruption of a judge to that court, had found the appeal "vexatious" and taxed costs of $500.00. This Court denied the petition for a writ of certiorari on January 19, 1993.

The third time that this probate case was before this Court was your docket #93-9786. The only question involved was: ARE INDIGENT PERSONS ENTITLED TO ACCESS TO THE COURTS WITHOUT PREPAYMENT OF FEES? Becoming disabled from his job, the undersigned was unable to pay entry fees in the Court of Appeals. The appeal was dismissed.

THE INTERESTING POINT HERE IS THAT THE DISMISSAL OCCURRED BECAUSE OF THE OPPOSITION TO INDIGENT ACCESS TO THE COURTS PROVIDED BY RESPONDENT HERE, JOHN B. KIEFER. THE QUESTION ON APPEAL WAS HIS APPOINTMENT WITHOUT INTENTION TO PROCEED WITH THE QUESTION OF THE CONVERSION OF ASSETS BY LORALEE REKUCKI. Discussions had disclosed that his intention in the case was to oppose the undersigned upon any appeals that were taken of Corrupt Judge Nowicki's Orders. He announced that he had no intention of proceeding with the conversion issue. Later experience has demonstrated the truth of his aversions.

It must be made clear here that no "wrongdoing" was proved against Kiefer because he had prevented indigent access to the courts, and the undersigned was, at that time, indigent. (Indigence is no longer claimed.)

This Court denied certiorari on October 3, 1994.

This was the stage of the proceedings at which the federal question of access to the Courts was first raised.

Although the petition was filed as an indigent, once that the indigent status no longer was in existence due to recovery from disability, a check for $300.00 was sent by the undersigned. Deputy Clerk Lorson returned that check on October 3, 1994 with a cover letter stating that the petition was denied although the check had been received on September 26, 1994.

The fourth time that this case was before this Court was your docket #94-5686. This Court had not yet decided #93-9786, above, when the petition was filed and everything that was written above of #93-9786 can also be said of #94-5686, except that, instead of dealing with the appointment of Kiefer as personal representative, it dealt with his appointment as temporary personal representative. In Michigan, a personal representative or temporary personal representative are not permitted, normally, to follow the case to higher courts at the expense of the estate; by responding to appeals. Since Kiefer had announced that intention and was so proceeding, his removal was sought. Again, he resisted the availability of the appellate process to indigent persons. And again the Court of Appeals rewarded him by dismissing the appeal. Again, action was taken against a Court Reformer. Again, indigent access to the Courts was deprived. And, once again, no hearing on the merits of the "wrongful" conduct of Kiefer ever took place.

One wonders how a court can refuse to open its doors to hear about the wrongful conduct of an attorney, and then grant him his fees in preventing access to the courts for an indigent because he was successful at preventing that indigent from being heard.

The doors of the Court House were bolted to equal justice.

This Court denied the petition for the writ of certiorari on October 11, 1994.

When one is denied a hearing, and is not afforded his day in Court, one cannot prove anything to be "wrongful".

Yet, the Court of Appeals has not only permitted Kiefer to bill the estate for preventing the indigent access to the Courts of the undersigned, in the knowledge that the undersigned is a beneficiary of the estate; the Court of Appeals has gone much further than that. The Court of Appeals has entered its order stating, in another appeal, that those fees (in fact, double those fees) are to be paid by the undersigned because his appeals are deemed "vexatious" merely because he filed too many appeals. That order is also a part of the appendix. It is understood that, since the Michigan Supreme Court has not yet acted upon that appeal, it is not yet ripe for application to this Court. It is included as an opinion in a companion case which is essential for a complete understanding of the issues presented.

Again, access to the Courts became an issue with the Michigan Court of Appeals decision, and this issues was raised in response to their decision.

The issue of the right to appeal has been an issue in this case from the beginning and was first raised in Probate Court. Among other things, Probate Judge Nowicki has entered an order stating that the undersigned could no longer appeal any of Nowicki's decisions. Nowicki, without appellate jurisdiction of any kind, has also exercised appellate jurisdiction by determining the merits of appeals from his own decisions prior to the Court of Appeals making any such determinations. The questions have been briefed and argued in all lower courts, and in fact the Macomb County Circuit Court has held that Nowicki acted without jurisdiction in exercising such appellate jurisdiction and in refusing to allow any appeals of his decisions. However, when Judge Nowicki and Respondent Kiefer were sued in Macomb Circuit Court under 42 USC 1983 and 1985, the case was dismissed by a different Circuit Judge. That judge, eager to participate in the harassment and disruption of the non-violent part of the Court Reform Movement, has however, permitted suit by Kiefer against both the petitioner herein and The Political Action Committee to Replace Judge Nowicki, a Court Reform Organization dedicated to the struggle against judicial corruption, which has raised about a quarter of a million dollars in the past 8 or 9 years. That suit is purely vexatious and frivolous, but the Circuit Judge hearing it has refused to dismiss it in the hope of discouraging the non-violent Court Reformers who have

chosen to operate within the system instead of violently. (Two other corruption suits have been filed against Judge Nowicki and John Kiefer under 42 USC 1983 and/or 1985. Both were in Federal Court. One, in which the movement was denied access to advertising space, is briefed in the 6th Circuit. The other, which dealt with corrupt land deals in Probate Court, was recently dismissed and the appellate process has begun in the Sixth Circuit. In that case, Nowicki has been particularly vindictive, since exposure of his entire corrupt real estate practices is sought.) These are again mentioned as a help to a complete understanding of the problems that Court Reformers are dealing with in Michigan when they choose a non-violent course of action. -- One other matter that should be mentioned in an attempt to help to define the problem is that, although Nowicki has been demonstrably motivated by vindictiveness, it has to date been impossible for the undersigned to obtain his disqualification. Many of these issues will eventually reach this Court, and it is not contended here that these cases are yet ripe for the action of this Court. They are merely introduced here so that the entire picture can be made clear.

CONCISE ARGUMENT

CAN AN ATTORNEY BE COMPENSATED BY A FUND FOR HAVING PREVENTED AN INDIGENT BENEFICIARY OF THAT FUND FROM EXERCISING HIS RIGHT TO APPEAL A DECISION REFUSING TO MARSHALL ALL OF THE ASSETS OF THAT FUND?

Court below: yes.

Petitioner: no.

Respondent: yes.

Bank subpoena results demonstrated, years ago, that Loralee Rekucki had converted some of the assets of the estate to her own use. The amount that was discovered was about $25,000.00. More may be undiscovered. The very simplest steps were taken by the undersigned in order to discover this amount. No full investigation was ever undertaken.

The Court of Appeals held that to be one of the reasons for appointing an independent personal representative, at estate expense, to proceed with conversion investigations and trials.

John Kiefer, an admitted law school roommate of a former Michigan Court of Appeals Judge whom the undersigned had, as a Court Reformer, tried to bring to justice years earlier for corruption, was selected. He stated that he would not proceed with the conversion question; but that he would oppose access to the appellate courts for the undersigned. He has made good, over a period of several years, on both threats.

The right to be heard is elementary. "(P)ersons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." Boddie v. Connecticut, 401 US 321 (1971). Boddie enforces the due process clause of the Fourteenth Amendment. And, a fair and open hearing is a constitutional guarantee, and a decision must not be arbitrary. R.R. Comm'n v. Pacific Gas Co., 302US 388, 393 (1938). An individual is entitled to unfettered freedom of access to the Courts. California Motor Transport Co. v. Trucking Unlimited, 404 US 508 (1972); Faretta v. California, 4322 US 806 (1974); Bounds v. Smith, 430 US 817 (1977); and Haines v. Kerner, 404 US 519 (1972).

In Fuentes v. Shevlin, 407 US 67, 80 (1971) this Court held that: "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard ...' " (Citations of authority omitted) The decision of this Court went on for several pages to discuss this time honored concept of a right to be heard as an essential part off procedural due process.

This Court, in expanding Johnson v. Avery, 393 US 483 (1969) to allow non-attorney representation in civil rights actions as well as habeas corpus actions, stated in Wolff v. McDonnell, 418 US 539, 579 (1973) that: "The right of access to the courts, upon which Avery was premised, is found in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights."

Indigent access cannot be deprived merely because of

such indigence. In Boddie v. Connecticut, supra, this court held that due process of law prohibits a State from denying, solely because of inability to pay fees and costs, access to the courts to indigents, who were welfare recipients. The costs involved averaged $60.00. This Court stated at page 379: "a statute or a rule may be held unconstitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of state power is beyond question." And, on that same page: "No less than these rights, the right to a meaningful opportunity to be heard within the limits of practicality, must be protected against denial by particular laws that operate to jeopardize it for particular individuals." (citations omitted)

This Court has held that an appeal cannot be arbitrarily denied.

In Lindsey v. Normet, 405 US 56, 74 - 79 (1972) this Court made that principle clear> At page 77: "This Court has recognized that if a full and fair trial on the merits is provided, the Due Process Clause of the Fourteenth Amendment does not require a State to provide appellate review, and the continuing validity of these cases is not at issue here. WHEN AN APPEAL IS AFFORDED, HOWEVER, IT CANNOT BE GRANTED TO SOME LITIGANTS AND CAPRICIOUSLY OR ARBITRARILY DENIED TO OTHERS WITHOUT VIOLATING THE EQUAL PROTECTION CLAUSE." (emphasis added, numerous citations of authority omitted) In the case at bar, a trial was not provided on the issue of conversion or on the issue of Kiefer's appointment without trying the conversion issue, and an appeal was not made available to ANY appellate court. At page 78: "We do not question here reasonable procedural provisions to safeguard litigated property, or to discourage patently insubstantial appeals, if these rules are reasonably tailored to achieve these ends and if they are uniformly and nondiscriminatorily applied." (citations of authority omitted) In the within case, appeals were permitted, even to the undersigned, when he paid appeal fees. They were denied to the undersigned when he was indigent. Lindsey, supra, at page 79: "The discrimination against the poor, ... , is particularly obvious"

In M.L.B. v. S.L.J., 136 L Ed 2d 473 (1996), this Court held that Mississippi's conditioning of a natural

mother's right to appeal from a civil decision terminating her parental rights on her ability to prepay record preparation fees was inconsistent with the 14th Amendment's due process and equal protection clause.

As the above case, Mayer v. City of Chicago, 404 US 189 (1971), also dealt with a transcript question. The present case deals with filing fees waived by Court Rule, not a transcript fee; but, in the instant case, the Court refused to follow its own rule to waive such fees for indigents. The rule uses two different definitions of indigent, one of them being a food stamp recipient, as the undersigned was. Mayer, supra, states at page 193 that it is now fundamental that: "once established ... avenues [of appellate review] must be kept free of unreasoned distinctions that can only impede open and equal access to the courts.' " (citations of authority omitted) And, at page 196: "Where the accused, as here, is not subject to imprisonment, but only a fine, the city suggests that his interest in a transcript is outweighed by the State's fiscal and other interests in not burdening the appellate process. This argument misconceives ..." There is, in the instant case, no imprisonment contemplated, however, substantial fee awards have been made below, in a punitive manner. The fees are then comparable to a fine. The fees punish a failure to prove what could not be proven because the Court of Appeals in Michigan would not listen since the undersigned was, at that time, an indigent food stamp recipient. And again, at page 197 - 198: "Arbitrary denial of appellate review of proceedings of the States' lowest trial courts may save the State some dollars and cents, but only at the substantial risk of generating frustration and hostility toward its courts among the most numerous consumers of justice."

What the Michigan Courts have done here is to prevent a then-indigent person from assisting with the marshalling of the funds of an estate. Then the Michigan Courts have ruled that the person who wrongfully prevented such marshalling is entitled to fees for so doing. In Trustees v. Greenough, 105 US 527 (1881) this Court held that when actions benefit a fund that fund should pay the attorney. The estate was not benefitted by allowing Loralee Rekucki's conversion of estate assets. But, the Michigan Court of Appeals has gone further by stating that double that fee must be paid by the undersigned because he took too many

appeals.

It must be mentioned that the appeals were of the appointments mentioned above, the fees for Kiefer (concerning which the Court of Appeals in Michigan created an exception to the generally accepted case and statutory law for this case only, and how was the undersigned to know that the uncontroverted law would not be followed in his case), and orders entered to prevent appeals (by Probate Judge Nowicki, of his own orders). This is similar then to a suit for monetary damages as a result of exercising a constitutional right to appeal, in which damages have been awarded to those who have prevented and consistently opposed the exercise of that right in order to protect fee awards and to prevent marshalling converted assets.

"Suits for monetary damages are meant to compensate the victims of wrongful actions and to discourage conduct that may result in liability." Forrester v. White, 484 US 219, 223 (1987).

"And, 'where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief.' " (citations of authority omitted) Bivens v. Six Unknown Fed. Narcotics Agents, 403 US 388, 392 (1970).

In Sprague v. Ticonic National Bank, et al, 307 US 161 (1939), we find that costs against a party are allowed only in exceptional cases, for dominating reasons of fairness and justice in the circumstances of the particular case. Dominating reasons of fairness and justice would require that the fees involved, if they are to be paid to Kiefer, should be paid by Rekucki not by the fund or Cousino. It is Rekucki who converted funds, it is Cousino who uncovered that by bank subpoena, and it is Kiefer who seeks to prevent access to the courts to prevent recovery of assets by the estate. Kiefer has the responsibility to marshall the assets of the estate, not to condone conversion. Certainly not to prevent the exercise of constitutional rights, such as the right to appeal.

In the Hammond case, supra, relied upon by the Michigan Court of Appeals, is citation to both Trustees v. Greenough, supra, and Sprague, supra.

How curious that this Court's decisions in those two cases have somehow become twisted and perverted so that

the person who is trying to marshall the fund assets is punished for indigence. The person who has converted assets is manifestly rewarded by being granted not only the converted assets, but also the right to collect an amount equal to the fees paid for the attorney who protected her conversion by preventing appeals and seeking punishment for exercise of the right of appeal. (The Court of Appeals has ordered double fees because of the vexatious nature of taking an indigent appeal, and then after dismissal for indigence, being unable to point to a finding of wrongdoing by the attorney who prevented the appeal. Loralee Rekucki, primary beneficiary of the estate along with the undersigned, will benefit from that doubled fee.)

There is a prior decision of this Court in which State Court handling of attorney fees was taken to this Court on the allegation that such violated the "equal protection" and "due process" clauses of the 14th Amendment. In Missouri, Kansas & Texas Railroad v. Cade, 233 US 642, 651 - 652 (1914), it was held that: "The outlay for an attorney's fee is a necessary consequence of the litigation, and since it must fall upon one party or the other, it is reasonable to impose it upon the party whose refusal to pay a just claim renders the litigation necessary. The allowance of ordinary costs of suit to the prevailing party rests upon the same principle. Numerous cases in the state courts have sustained similar legislation. If a reasonable penalty may be imposed for failure to satisfy a demand found to be just, it follows a fortiori that costs and an attorney's fee may be." (citations of numerous authorities omitted)

Loralee Rekucki refused to pay a just claim by returning converted assets to the estate. Paul W. Cousino sought a personal representative who would pursue that claim. John B. Kiefer was appointed to that position with no intention of proceeding to marshall the converted assets, and he prevented Cousino from presenting his case to the appellate court (when the lower court refused to follow the appellate court mandate to see to it that the claims were pursued). The appellate courts then have ordered Cousino to pay Kiefer's fees and then to make a similar payment to the estate (by awarding double fees); i.e., to Rekucki. The decision of this Court in its 1914 decision above has been turned inside out.

The Michigan Court of Appeals did not properly rely

upon In re Hammond Estate, 215 Mich App 379 (1996). In Hammond, an independent personal representative (not a temporary personal representative of a supervised estate, such as Kiefer) of an unsupervised estate did NOT follow the case to appellate courts. Kirkendall was only involved in litigation in the lower court in which he billed the estate for legal services. He was NOT billing the estate for services upon appeal.

In the revered case of Brilliant v. Wayne Circuit Judges, 110 Mich 68 (1896), it was found that an executor cannot be reimbursed for following a case to higher courts. See also In re Davis's Estate, 312 Mich 258 (1945); In re Valentino Estate, 128 Mich App 87, 93 (1983); Becht v. Miller, 279 Mich 629 (1937); In re Baldwin's Estate, 311 Mich 288, 314 (1945); Merkel v. Long, 372 Mich 144 (1963); In re Brack Estate, 121 Mich App 585 (1982); In re Prichard Estate, 164 Mich App 62 (1987); and In re Humphrey Estate, 141 Mich App 412, 441 (1985).

Finally, see in re Sloan Estate, 212 Mich App 357 (1995) which held that attorney fees and costs incurred in the establishing and defending of a petition for attorney fees associated with the administration of an estate are not chargeable against the estate, because such additional attorney fees and costs do not benefit the estate.

In closing, one final point must be made. I am not the only elected official to bring public charges against Nowicki. (I have been an elected trustee of Macomb Community College for the past 23 years.) Additional charges have been brought by the County Board of Commissioners, various City Councilmen, State legislators, the Macomb County Prosecutor and even the Michigan State Police (although I have been informed by a source in the Prosecutor's Office that the officer who filed the report concerning activity at the Nowicki supervised Youth Home has been vindictively transferred to the upper peninsula).

RELIEF

Clearly, a state court has decided an important federal question of federal and constitutional law that has not been, but should be, settled by this Court; and further, the decision in that State Appellate System is in conflict with relevant decisions of this Court.

Clearly, neither the fund nor the undersigned are legitimately responsible for the fees charged by Kiefer to deprive the right of indigent access to the appellate courts. Neither is the fund or the undersigned responsible for the fees when the sole purpose of Kiefer's barratry has been to prevent the marshalling of the converted assets of the estate. Clearly, it cannot be said that wrongfulness was not shown when access to the courts (to make such a showing) was deprived. If Kiefer's fees are not to be backcharged against himself personally, then they should be charged against Loralee Rekucki, the only party to benefit from Kiefer's refusal to marshall the converted assets.

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Supreme Court, U.S.
FILED
971611 MAR 27 1998

IN THE SUPREME COURT OF THE UNITED STATES

IN THE MATTER OF THE ESTATE OF
PAUL K. COUSINO, deceased

MACOMB COUNTY PROBATE COURT #86-96297-SE

MICHIGAN COURT OF APPEALS #174253 & 184104

MICHIGAN SUPREME COURT #109145 & 109145

APPENDIX
IN SUPPORT OF PETITION FOR WRIT

SUBMITTED BY:
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ORDER ALLOWING ACCOUNT
Estate of Paul K. Cousino, deceased
Date of hearing: March 23, 1994 Judge: James F. Nowicki
John B. Kiefer Temporary Personal Representative of the estate has filed a petition requesting the allowance of First Annual account
Notice of the hearing was given to or waived by all interested parties.
The petitioner appeared.
It appears to the court after due examination of the account, that the petition is correct and ought to be allowed, including fiduciary and attorney fees.
IT IS ORDERED that the account be allowed.
March 23 1994 JAMES F. NOWICKI
Judge of Probate

ORDER ALLOWING ACCOUNT
Estate of Paul K. Cousino, deceased
Date of hearing: March 1, 1995 Judge: James F. Nowicki
John B. Kiefer, Temporary Personal Representative and Personal Representative of the estate has filed a petition requesting the allowance of Second Annual account.
Notice of hearing was given to or waived by all interested parties.
The petitioner appeared.
It appears to the court, after due examination of the account, that the petition is correct and ought to be allowed, including fiduciary and attorney fees.
IT IS ORDERED that the account be allowed and the Guardian Ad Litem fees be paid.

March 1, 1995 JAMES F. NOWICKI
Judge of Probate

Court of Appeals, State of Michigan
ORDER
In re Estate of Paul K. Cousino, deceased

Docket #174253 & 184104
L.C. #86-96297-SE

David H. Sawyer
Presiding Judge
Clifford W. Taylor
Michael J. Matuzak
Judges

Pursuant to MCR 7.214(E) and 7.216(A)(7), the Court dispenses with oral argument (in Docket No. 184104) and AFFIRMS the March 23, 1994 and March 1, 1995 orders of the Macomb Probate Court in this cause, to the extent authorizing reimbursement from the estate for attorney fees and costs expended by the personal representative in defending his appointment on appeal. Attorney fees incurred by an executor to defend against a petition for his removal are properly chargeable against the estate where no wrongdoing is proved. In re Hammond Estate, 215 Mich App 379, 387 (1996).

A true copy entered and certified by Ella Williams, Chief Clerk, on January 24, 1997 /s/

Court of Appeals, State of Michigan
ORDER
Estate of Paul K. Cousino, deceased
Docket #174253 & 184104
L.C. #86-96297-SE

David H. Sawyer
Presiding Judge
Clifford W. Taylor
Michael J. Matuzak*
Judges

The Court orders that the motion for rehearing is DENIED.

*Circuit judge, sitting on the Court of Appeals by assignment.

A true copy entered and certified by Ella Williams, Chief Clerk, on April 9, 1997 /s/

ORDER Michigan Supreme Court, Lansing, Michigan
Entered: December 30, 1997

109145-6

IN RE ESTATE OF COUSINO, SC: 109145-6
COA: 174253 & 184104
LC: 86-96297-SE

PAUL W. COUSINO,
Appellant

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

Taylor, J., not participating.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

December 30, 1997 /s/

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of the Estate of PAUL K. COUSINO, Deceased.

PAUL W. COUSINO, Contestant-Appellant

v

S. LEE ELLIOTT, Personal Representative of the Estate of PAUL K. COUSINO, Deceased, and LORALEE REKUCKI, Proponents-Appellees

and
HAROLD I. GACH, DAVID GRIEM, DAWN COUSINO, and DALE S. ADAMS, Appellees

PAUL W. COUSINO, Contestant-Appellant

v

ARTHUR J. ROSE, III, Temporary Personal Representative of the Estate of PAUL K. COUSINO, Deceased, and LORALEE
REKUCKI, Proponents-Appellees

and
HAROLD I. GACH, S. LEE ELLIOTT, DAVID GRIEM, DALE S. ADAMS and CHARLES H. EARL, JR, Appellees

PAUL W. COUSINO, Contestant-Appellant

v

LORALEE REKUCKI, Proponent-Appellee

November 14, 1991

Nos 112719, 115406, 115587

No. 118116

No 120943

Before: Neff, PJ, and Gillis and Michael J. Kelly, JJ

These five consolidated appeals involve the Estate of Paul K. Cousino. Contestant Paul W. Cousino, son of the decedent, successfully set aside in a separate action his father's 1985 will on the ground that it was a product of undue influence exerted by the decedent's daughter. and the contestant's sister, Loralee Rekucki. Consequently, the decedent's 1978 will was admitted to probate. That will is the subject of the instant action.

The 1978 will nominated contestant to be the personal representative of the Paul K. Cousino Estate. Rekucki, however, objected to the appointment on the basis that the animosity between the contestant and herself would interfere with the proper administration of the estate. The probate court agreed and appointed a third party, S. Lee Elliott, as personal representative. The contestant appealed the appointment and Elliott was then made the temporary personal representative of the estate, pending outcome of the appeal. Contestant again objected to the temporary appointment, claiming that Elliott had a conflict of interest because he was an associate of Rekucki's counsel in this matter. The trial court this time stayed the order appointing Elliott as temporary personal representative and in his place appointed Arthur J.Rose III.

The probate court also entertained various motions regarding the granting of attorney fees and the rental of estate property. From the lower court's rulings concerning appointment of the personal representative as well as from the holdings on the motions regarding attorney fees and administration of the will, contestant appeals as of right. The appeals have been consolidated by this Court.

I

The first issue presented is whether the probate court abused its discretion in failing to appoint contestant as a personal representative of the estate, and in failing to accept certain evidence during the hearing on this matter.

The question of whether a personal representative should be removed is one entrusted to the discretion of the probate court. In re Humphrey Estate, 141 Mich App 412, 423; 367 NW2d 873 (1985). In this case the probate court found that contestant and Rekucki, the two primary beneficiaries of the will, were unable to agree or cooperate

regarding the disposition of the estate, and that their animosity would interfere with the contestant's ability to properly administer the estate. The record before this Court supports the probate court's finding, and in light of the inability of contestant and Rekucki to move forward without constant bickering and objection, we find no abuse of discretion in the court's appointment of a third party to represent the estate.

Neither do we find error in the court's failure to hold an evidentiary hearing concerning contestant's suitability to serv e as the estate's personal representative. A hearing was held on the petition for appointment of the personal representative. The parties gave oral argument and, as we have found above, the court within its discretion found contestant unsuitable to serve as personal representative of the estate. Contestant relies on MCL 700.164; MSA 27.51264 and MCL 700.172; MSA 27.5172 for the proposition that he is entitled to a hearing at which he would have the opportunity to submit evidence. We find no such requirement mandated by these statutes. Furthermore, contestant fails to allege any evidence that would be relevant to the issue at hand.

II

The next issue is whether the trial court erred in appointing Elliott as the personal representative of the estate.

Contestant was not appointed personal representative of the estate, although nominated by the will, because the animosity between himself and Rekucki would have interfered with the administration of the estate. To ensure an expedient disposition of the estate, the court indicated that it would appoint an independent, third party personal representative if the parties could not agree on such a representative. When the parties could not reach an agreement, the court on October 6, 1988, appointed Elliott. On March 13, 1989, Jerald R. Lovell, of counsel to Elliott's law firm, substituted for Charles H. Earl, Jr. as Rekucki's counsel on several matters involving the estate. Thus, although no conflict existed at the time Elliott was appointed personal representative, a potential or apparent conflict has since arisen. Accordingly, we agree with contestant that Elliott is not a suitable independent, third party personal representative. This Court has found nothing improper in either

Elliott's or Rose's administration of the estate, but in light of the fact that the contestant was not appointed to represent the estate in favor of someone who was to be a disinterested, third-party personal representative, that appointment should go to a representative without ties to either party in order to avoid the appearance of partiality and to expedite the closing of this troubled estate. We direct the probate court to appoint a personal representative who is unaffiliated and independent of the parties to this litigation.

We reject as meritless contestant's assertion that Eliott bear the cost of the bond which he was required to secure when appointed personal representative of the estate.

III

Contestant also raises a claim that the probate court erred in declining jurisdiction over nonprobate assets allegedly converted from the estate by Rekucki. We find no error. A claim of wrongful conversion must be brought by the personal representative of the estate. MCL 700.171; MSA 27.5171. A personal representative's role in bringing an action for conversion exemplifies the need in this case for a disinterested personal representative.

IV

The last issue raised by contestant concerns the probate court's disposition regarding attorney fees.

First, we find no merit in contestant's argument that the court abused its discretion in ordering the estate to pay the attorney fees incurred by Rekucki to defend the 1985 will which was eventually set aside. The person nominated by a will as personal representative may, upon approval of the court, retain counsel for the purpose of sustaining the will. MCL 790.148; MSA 27.5148; se also In re Sarras Estate, 148 Mich App 171; 384 NW2d 119 (1986).

Next, we disagree with contestant's assertion that the probate court abused its discretion in granting attorney fees to Rose, as temporary personal representative, for services performed in connection with the petition to rent estate property. Rose's proposal regarding the property was made in the interest of the estate, notwithstanding any derivative benefits gained by Rekucki. The trial court did not abuse its discretion.

We do, however, agree with contestant that the court abused its discretion in denying attorney fees for contestant's successful challenge of the 1985 will. Attorney fees are

chargeable to the estate when the services rendered were beneficial to the estate as a whole rather than to an individual or a group of individuals interested therein. Becht v. Miller, 279 Mich 629; 273 NW 294 (1937); In re Valentino Estate, 128 Mich App 87, 96; 339 NWW 2d 698 (1983). We conclude that it is beneficial to the estate as a whole to strike a will which has been obtained under undue influence and therefore against the inclination and volition of the testator. To find otherwise would be to disparage the policy of distributing the estate according to the decedent's true intent. The attorney fees incurred by contestant in challenging the 1985 will are chargeable to the estate.

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/

STATE OF MICHIGAN
COURT OF APPEALS

In the matter of PAUL K. COUSINO, deceased

JOHN B. KIEFER, Temporary Personal Representative of the Estate of PAUL K. COUSINO, Deceased, Petitioner-Appellee

v

PAUL W. COUSINO, Respondent-Appellant

October 10, 1997

Nos. 194005; 194118
Macomb Probate Court
LC No. 89-96297-SE

Before: Smolenski,PJ and Fitzgerald and Gage, JJ

PER CURIAM

In Docket No. 194005, respondent appeals a probate court order authorizing petitioner to list and sell the real estate and a mobile home owned by the estate. In Docket No. 194889, respondent appeals as of right from two orders entered by the probate court: an order allowing petitioner's third annual account and an order imposing sanctions in the amount of $63,232 against respondent for vexatious proceedings, the reasonable expenses incurred, including fiduciary and attorney fees, and $500 in costs for an unpaid sanction imposed in a previous appeal.

We affirm the orders allowing the account and authorizing petitioner to list and sell the real estate. We also affirm the order imposing sanctions to the extent that those sanctions include expenses for frivolous claims filed in the probate court pursuant to MCR 2.114(F). To the extent that the order included sanctions for vexatious appeals before this Court, we note that the probate court lacked authority to impose sanctions. However, this Court, possessing such authority, sanctions respondent pursuant to MCR 7.216(C)(1) for vexatious appeals and proceedings in this Court and remands pursuant to MCR 7.215(C)(2) for a determination of actual and punitive damages.

This case concerns the estate of respondent's father, Paul K. Cousino. Respondent and his sister are the two principal beneficiaries of the estate. The petition for commencement of probate proceedings was filed on July 7, 1986. However, because of numerous objections and appeals filed by respondent, the case has not yet been concluded.

Petitioner was appointed as personal representative in October 1992 and temporary personal representative in April 1993. In February 196, petitioner filed petitions with the probate court seeking authorization to list and sell the real estate, allowance of the third account, and sanctions against respondent for filing frivolous appeals. The probate court granted the petitions.

This Court reviews the actions of the probate court for an abuse of discretion. In re Rice Estate, 138 Mich App 261, 270; 360 NW2d 587 (1984). Because a trial court's decision to award sanctions pursuant to MCR 2.114 involves findings of fact, this Court reviews the trial court's ruling to determine whether it was clearly erroneous. Contel Systems v. Gores, 183 Mich App 706, 711; 455 NW2d 398 (1990).

Respondent first argues that petitioner cannot recover his fees because an executor cannot be paid from the estate for following a case to higher courts. MCL 700.543; MSA 27.5543 enables a fiduciary of an estate to employ an attorney to perform legal services on behalf of the estate and provides that the attorney shall receive reasonable compensation for those services. To be chargeable to the estate, the services must have been beneficial to and on behalf of the estate. In re Valentino, 128 Mich App 87, 94 - 95; 339 NW2d 698 (1983). For example, this Court has allowed an executor to recover from the estate fees incurred in defending his position as executor, provided that there was no wrongdoing on the part of the executor. In re Hammond Estate, 215 Mich App 379, 387; 547 NW2d 36 (1996); In re Humphrey Estate, 141 Mich App 412, 441; 367 NW2d 873 (1985). Therefore, the probate court did not abuse its discretion in allowing petitioner's third annual account, including fiduciary and attorney fees for services rendered while defending his position as personal representative.

This Court has also concluded that MCL 700.543; MSA 27.5543 does not allow the estate to pay attorney fees incurred in defending a petition for attorney fees. In re Sloan Estate, 212 Mich App 357, 360 - 361; 538 NW2d 47 (1995). These "fees for fees" claims are normally not recoverable because they do not benefit the estate by increasing or preserving the estate's assets. Id at 363. However, this Court also noted that the probate court may be authorized to award these costs in exceptional circumstances:

> Nonetheless, where extraordinary fees and costs are incurred because of an opposing party's frau d, unjustified objections raised in bad faith, or other extraordinary circumstance, the probate court is authorized to impose appropriate sanctions via various fee-shifting mechanisms. See, e.g., MCR 5.114; MCR 2.114(B)-(F). [Id at 363, n2.]

We conclude that the present case presents extraordinary circumstances in which it is appropriate to award fees and costs as a sanction against respondent pursuant to MCR 2.114(F). Respondent's actions in this case have turned a straightforward matter into a proceeding which has lasted more than ten years. Respondent has appealed almost every order entered by the probate court during that period, filing some eleven appeals in this Court alone. MCR 2.114(F)

allows the court to impose sanctions for frivolous claims. Costs awarded may include court costs and reasonable attorney fees. MCL 600.2591(2); MSA 27A.2591(2). Therefore, we conclude that while fees for fees are not recoverable under MCL 700.543; MSA 27.5543, the probate court neither abused its discretion nor clearly erred in imposing sanctions against respondent for frivolous claims filed in probate court.

However, the probate court did not have authority to impose sanctions for vexatious appeals pursuant to MCR 7.216(C)(1). That authority lies with this Court. We find that the appeals filed by respondent have been taken to delay the closing of the estate without any reasonable basis for believing a meritorious issue was involved and were grossly lacking in the requirements of propriety. Therefore, this Court sanctions respondent for the reasonable expenses incurred by respondent's vexatious appeals. Pursuant to MCR 7.216(C)(2), we remand to the probate court to determine actual costs incurred by the estate, including reasonable attorney fees. We also award punitive damages in an added amount equaling the amount of actual damages.

Respondent also argues that the probate court could not authorize the sale of the real estate. First, respondent suggests that authorizing the sale after respondent and his sister failed to reach an agreement concerning the disposition of the real estate impinged on his right to appeal. Hoever, authority cited by respondent does not support this position, and we conclude the argument is without merit. This Court will not search for authority to support or reject a party's position. Hover v. Chrysler Corp. 209 Mich App 314, 319; 530 NW2d 96 (1995).

Second, respondent contends that by authorizing the sale, the probate court is, in essence, rewriting the will to reflect the intent of the court instead of that of the testator. We disagree. The language contained in the will indicated only a desire to keep the real estate in the family for as along as practicable. It did not create a command that the real estate must never be sold. See In re Stuart's Estate, 274 Mich 282, 285; 264 NW 372 (1936) (language indicating a desire that something be done is precatory language). Petitioner presented sufficient evidence to the probate court that maintaining the real estate has cost the estate approximately $8,300 annually. Therefore, we conclude that the probate court did not abuse its discretion in authorizing

petitioner to list and sell the real estate.

Affirmed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/

Amendment 14, section 1

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

28 USC 1257(a)

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."